Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	**)**	**WT Docket No. 17-79**
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	**)**	**WC Docket No. 17-84**

AT&T OPPOSITION TO PETITION FOR RECONSIDERATION

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AT&T files this opposition to the Petition for Reconsideration ("*Petition*") filed by the Joint Petitioners[1] of the Declaratory Ruling and Third Report and Order[2] adopted by the Federal Communications Commission (the "Commission") in the above-referenced dockets.

I. INTRODUCTION AND SUMMARY.

The Commission initiated WT Docket No. 17-79 to examine "regulatory impediments to wireless network infrastructure investment and deployment, and how [to] remove or reduce such impediments consistent with the law and the public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans."[3] After considering the

[1] Petition for Reconsideration of the City of New Orleans, Louisiana, the Virginia Municipal League, the Kentucky League of Cities, the Mississippi Municipal League, the Pennsylvania Municipal League, the Alabama League of Municipalities, the Arkansas Municipal League, the Nevada League of Cities and Municipalities, the Town of Middleburg, Virginia, and the Government Wireless Technology & Communications Ass'n, WT Docket No. 17-79, WC Docket No. 17-84 (filed Nov. 14, 2018) ("*Petition*").

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (rel. Sept. 27, 2018) ("*Section 253/332 Order"*).

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3331, ¶2 (2017).

extensive record in the docket, including hundreds of filings and meetings with stakeholders, the Commission concluded that it was "necessary and appropriate to exercise [its] authority to interpret the [Communications] Act and clarify the preemptive scope that Congress intended."[4] As applicable here, the Commission reaffirmed its standard for interpreting an "effective prohibition" under Section 253 of the Communications Act,[5] extended that standard to interpret an "effective prohibition" under Section 332 of the Communications Act,[6] developed tests for evaluating fee and non-fee requirements against that standard, and adopted a reduced Section 332 shot clock for small wireless facilities.

Joint Petitioners seek reconsideration of the Commission's *Section 253/332 Order* on the basis that it "ignores the interests of municipalities nationwide, in an effort to serve the economic needs of wireless carriers."[7] At the most basic level, Petitioners merely disagree with the Commission's primary policy decision for adopting the *Section 253/332 Order*—that state and local actions are materially impeding fifth generation ("5G") and other small cell deployments[8]—and the Commission's actions taken in the *Section 253/332 Order* intended to remove those impediments. Joint Petitioners rely on arguments that this Commission fully considered and rejected in the *Section 253/332 Order* and inject multiple arguments that mischaracterize the *Section 253/332 Order* and its import. The Commission should reject Joint Petitioners'

[4] *Section 253/332 Order*, 33 FCC Rcd at 9096, ¶23.

[5] 47 U.S.C. §253.

[6] 47 U.S.C. §332.

[7] *Petition* at 13. Citations to page numbers in this Opposition are estimated because the Petition for Reconsideration lacked page numbers.

[8] *Section 253/332 Order*, 33 FCC Rcd at 9096, ¶25 ("Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure . . . . The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.")

mischaracterizations and invitation to revisit those arguments. To the extent that the *Petition* makes allegations that could, in the broadest sense, be considered new, Joint Petitioners fail to demonstrate that reconsideration would serve the "public interest." In fact, Joint Petitioners allege only that the *Section 253/332 Order* harms only "the interests of municipalities." For these reasons, the Commission should deny the *Petition*.

II. DISCUSSION

A. An Abundant Record Supports the Commission's *Section 253/332 Order.*

Petitioners argue that the Commission's actions in the *Section 253/332 Order* are "without any real justification."[9] To the contrary, an abundant record justifies the Commission's actions as necessary and appropriate. The *Section 253/332 Order* identifies at least 15 states where municipalities have imposed barriers to infrastructure deployment.[10] Numerous other examples fill the record.[11] The Commission was "also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created . . . to identify barriers to deployment of broadband infrastructure."[12] Based on this extensive record, the Commission rightfully concluded that some "state and local jurisdictions are materially impeding [infrastructure] deployment in various ways."[13]

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[9] *Petition* at 15.

[10] *See, Section 253/332 Order,* 33 FCC Rcd at 9096-98, ¶¶25-27.

[11] *See, e.g.,* Letter from Henry Hultquist, Vice President-Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 17-79, WC Docket No. 17-84 (filed Aug. 10, 2018).

[12] *Section 253/332 Order,* 33 FCC Rcd at 9098, ¶27.

[13] *Id.* at 9096, ¶25.

Joint Petitioners do not dispute that some municipalities overreach and impede infrastructure deployment. Instead, Joint Petitioners allege that the examples cited in the *Section 253/332 Order* are "outliers" only and that states, cities, and counties normally work with carriers.[14] But, "outlier conduct" is exactly what the *Section 253/332 Order* is intended to address.[15] "Outlier conduct" still impedes infrastructure deployment in violation of Sections 253 and 332, and, as demonstrated by the extensive record in this docket, is pervasive.

Moreover, carriers have encountered these impediments in just the earliest stages of small wireless facility deployments. Over the next few years, these facilities will be deployed at an accelerated rate.[16] With over 19,000 incorporated cities, towns, and villages in the United States,[17] over 3,000 counties in the United States,[18] and thousands of other local government entities, plus dozens of equivalent entities in U.S. Commonwealths and Territories,[19] even a moderate percentage of "outliers" would still create a patchwork amounting to thousands of barriers across the country. The clarifications provided in the *Section 253/332 Order* are both helpful and necessary to avoid this type of environment and to set the ground rules for the wide-spread

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[14] *Petition* at 15.

[15] *Section 253/332 Order*, 33 FCC Rcd at 9098, ¶27 ("Our Declaratory Ruling and Third Report and Order are intended to address . . . outlier conduct.")

[16] *Id.* at 9112, ¶47 (Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades. Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years. A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is "roughly double the number of macro cells built over the last 30 years.")

[17] *See* https://www.statista.com/statistics/241695/number-of-us-cities-towns-villages-by-population-size/.

[18] *See* https://www.usgs.gov/faqs/how-many-counties-are-there-united-states.

[19] *Id.*

deployment of small wireless facilities. For these reasons, the Commission should not reconsider its findings in the *Section 253/332 Order*.

B. The *Section 253/332 Order* Adopts Reasonable and Flexible Standards.

Joint Petitioners allege that the *Section 253/332 Order* "treats the entire country as homogenous, ignoring [the] very differences which have made the country the most desirable place to implement 5G technologies."[20] To the contrary, the Commission adopted "a balanced, commonsense approach, rather than . . . a one-size-fits-all regime" and acknowledged that state and local officials would "continue to play a key role in reviewing and promoting the deployment of wireless infrastructure in their communities."[21]

The *Section 253/332 Order* both defined an "effective prohibition" and explained how that definition should be applied. First, the Commission reaffirmed its long-standing "effective prohibition" standard: "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[22] Second, the Commission enunciated tests—based on reasonableness, objectivity, and non-discrimination—for evaluating whether certain fee and non-fee requirements comport with the Section 253 standard. Joint Petitioners have failed to demonstrate how these generic and subjective concepts impose homogenous requirements. In reality, the Commission's Section 253/332 standard allows for substantial

[20] *Petition* at 15.

[21] *Section 253/332 Order*, 33 FCC Rcd at 9090, ¶6.

[22] *Id.* at 9102, ¶35. Petitioners also argue that this Section 253 "effective prohibition" standard is overly broad. *Petition* at 23. This standard, enacted in the Commission's *California Payphone* decision, *California Payphone Ass'n*, 12 FCC Rcd 14191 (1997), has been in place since 1997, and has been interpreted by many courts. Petitioners offer no justification why the Commission should deviate from this long-standing standard and what would be a more appropriate standard.

flexibility and "accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on [s]mall [w]ireless [f]acilities and for state and local oversight that does not materially inhibit wireless deployment."[23]

1. Presumptively Reasonable Nonrecurring and Recurring Fees are Not Mandates.

Joint Petitioners attack the Commission's finding that excessive fees to place small wireless facilities in the right-of-way or on municipal infrastructure can violate Section 253 and its adoption of presumptively reasonable fees that would pass Section 253 muster. Joint Petitioners' argument fails, as it relies on mischaracterizations of portions of the *Section 253/332 Order*.

The *Petition* argues that the $270 presumptively reasonable recurring fee is a "mandate"[24] and a "flat fee."[25] In reality, the *Section 253/332 Order* neither mandated a particular fee nor set a flat fee. Rather, the Commission, relying on pole attachment rates and small cell bills adopted in many states, recognized that certain fee amounts would be considered "presumptively reasonable" under Section 253.[26] Any recurring and nonrecurring fee for small wireless facility placement, *including those exceeding the presumptively reasonable amounts*, would be lawful if (1) they reasonably approximate costs, (2) those costs are reasonable, and (3) those costs are non-discriminatory.[27] The Commission found that "[a]llowing localities to charge fees above these [presumptively reasonable] levels upon this showing recognizes local variances in costs"[28]

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[23] *Section 253/332 Order*, 33 FCC Rcd at 9095, ¶21.

[24] *Petition* at 16.

[25] *Id.* at 27.

[26] *Section 253/332 Order*, 33 FCC Rcd at 9129, n.233.

[27] *Id.* at 9130, ¶80.

[28] *Id.*

In a related argument, Joint Petitioners argue that the Declaratory Ruling would represent a "massive shift of costs from carriers to the public."[29] The Commission explicitly rejected this argument, finding that it had no support in the record[30] and emphasizing that the approach to compensation taken in the *Section 253/332 Order* would have the opposite effect—ensuring "that cities are not going into the red to support or subsidize the deployment of wireless infrastructure."[31] The Commission rejected the notion that state and local governments could not recover their legitimate costs: "[S]tates and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market. We decline to interpret a government's recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services."[32]

In reality, Joint Petitioners' argument is based on their inability to continue using profits generated from critical small wireless infrastructure placement to fund other policy goals.[33] Joint Petitioners do not deny, and make no apologies for, wanting to use fees from small wireless facilities to subsidize their own infrastructure and technology upgrades, such as "Advanced Metering Infrastructure/Smart Meters; Sensors; Emergency Management; and Grid

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[29] *Petition* at 28.

[30] *Section 253/332 Order*, 33 FCC Rcd at 9126, ¶73 ("[O]thers argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources. We find little support in the record, legislative history, or case law for that position.")

[31] *Id.* at 9126-27, ¶73.

[32] *Id* at 9116, ¶56.

[33] *Petition* at 17-18. ("Lower fees that are limited to "cost recovery," limits localities' ability to capitalize on the new technology addressed by the order and the ability to make the necessary upgrades to technology systems . . . .")

Modernization."[34] Other municipalities are on record wanting to do the same.[35] But, the record in this docket does not support imposing such costs on wireless carriers.

In the *Section 253/332 Order*, the Commission observed that "while it might well be fair for providers to bear basic, reasonable costs of entry, the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level."[36] The *Petition* likewise fails to explain why wireless carriers should bear the costs for state and local projects or governance unrelated to wireless facilities or, more generally, why costs unrelated to rights-of-way or municipal infrastructure use is "fair and reasonable" compensation under Section 253. Joint Petitioners simply cannot make that showing because the record supports the Commission's conclusion that "high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not 'fair and reasonable compensation . . . for *use* of the public rights-of-way' under Section 253(c)."[37] This Commission finding is supported by a strong record and should not be reconsidered.

Joint Petitioners hold-up small wireless facility placement agreements that some wireless carriers have reached with municipalities as evidence that Commission action is not needed and

[34] *Petition* at 17-18.

[35] *See, e.g.*, Comments of the City and County of San Francisco, WT Docket No. 17-79 at 8 (filed June 15, 2017) ("[W]ith tightening City budgets [SFPUC and SFMTA] also view these programs as a way to obtain needed revenues to fund their core programs."); Letter from Sam Liccardo, Mayor or San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of $24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).

[36] *Section 253/332 Order*, 33 FCC Rcd at 9116, ¶55.

[37] *Id.* at 9128, ¶76.

cannot substitute for a negotiated fee.[38] To the contrary, those agreements conclusively reveal the immense leverage that the largest cities have to extract high fees for use of the rights-of-way and municipal structures in those rights-of-way over which they hold a monopoly. The Commission recognized this reality and its downside: "A . . . geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions."[39]

This leverage is not hypothetical. The abundant record in this docket demonstrates that cities can and will use that leverage to extract the highest fees they can get before allowing small wireless facility placement. Replicated over thousands of municipalities across the country, those excessive fees undoubtedly impede infrastructure deployment. As the Commission concluded, "the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated [s]mall [w]ireless [f]acility deployment."[40] Thus, the Commission correctly concluded that action was necessary and fully supported.

2. The Reduced Small Wireless Facility Shot Clocks Were Appropriately Crafted to Adapt to Municipalities Nationwide.

Joint Petitioners double-down on the "one-size-fits-all" theme, arguing that the 60-day and 90-day small wireless facility shot clocks adopted in the *Section 253/332 Order* are too short

[38] *Petition* at 16.

[39] *Section 253/332 Order*, 33 FCC Rcd at 9121, ¶63.

[40] *Id.* at 9122, ¶65.

because they do not take into account the myriad of potential challenges municipalities may face meeting the reduced timeframes.[41] The Commission fully considered and rightly rejected this line of argument in the *Section 253/332 Order*.[42] The reduced shot clocks establish only a "presumptively reasonable" timeframe for review rather than an inflexible deadline, "allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face."[43]

The Commission adopted the reduced 60-day and 90-day small wireless facility shot clocks only after considering the potential challenges faced by municipalities, "siting agencies' increased experience with existing shot clocks, the greater need for rapid siting of [s]mall [w]ireless [f]acilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases."[44] "Several [state and local governments] are already reviewing and approving small-cell siting applications within 60 days or less after filing."[45] The Commission also recognized that the reduced small wireless facility shot clock is consistent with similar timeframes recommended in the BDAC's Model Code for Municipalities[46] and enacted by state small cell bills[47] and Section

[41] *Petition* at 20-22.

[42] *Section 253/332 Order*, 33 FCC Rcd at 9145-46, ¶110 ("We also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.")

[43] *Id.* at 9145, ¶109.

[44] *Id.* at 9142, ¶104.

[45] *Id.* at 9146, ¶111.

[46] *Id.* at 9147, ¶112.

[47] *Id.* at 9142-43, ¶105.

6409 of the Middle Class Tax Relief and Job Creation Act.[48] Consequently, the small wireless facility shot clocks are fully supported by the record.

C. Joint Petitioners Provide No Reasonable Grounds to Reconsider the Limits on Undergrounding Requirements.

Joint Petitioners argue that undergrounding of small wireless facilities should not be "inhibited" and that "[l]ocalities should have the ability to prescribe the location and aesthetics of these colocations."[49] Section 253 does not reserve that level of unfettered authority for state and local governments. In recognition of that fact, the Commission adopted a balanced and subjective test to evaluate state and local government undergrounding requirements under Section 253. Under that test, a lawful state or local undergrounding requirement must be (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, (3) objective, and (4) published in advance.[50] The Commission explained that under this test, an undergrounding requirement for all small wireless facilities or that materially inhibits wireless service would amount to an "effective prohibition."[51] Joint Petitioners fail to explain why local undergrounding requirements applied to telecommunications infrastructure would not be subject to this Section 253 analysis.

Joint Petitioners allege that the Commission's actions in the *Section 253/332 Order* would "thwart" some local governments' initiative to underground all utilities and refer to $90 Million that Dominion Energy has invested (and $2 Billion that it will invest) to meet local governments'

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[48] *Id.* at 9144, ¶108. ("[S]iting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days.")

[49] *Petition* at 22.

[50] *Section 253/332 Order*, 33 FCC Rcd at 9132, 9133, ¶¶86, 90.

[51] *Id.*

undergrounding requests.[52] Joint Petitioners arguments fail. The *Section 253/332 Order* will have no impact on state and local undergrounding requirements for investor-owned electric facilities, as Section 253 does not control the placement of electric utility facilities. Moreover, a blanket prohibition of all above ground utilities is less justified for and has more of an impact on wireless networks. Unlike electric utility facilities, wireless facilities are more widely spaced, do not support electric and telephone cable spans, and cannot operate underground. For those reasons alone, localities cannot prevent the placement of all wireless facilities in rights-of-way just because a locality wants them underground.[53] Lastly, investor-owned electric utilities can recover undergrounding costs directly from their ratepayer base. The hypercompetitive wireless industry limits a carrier's ability to freely recoup its capital expenditures in that manner. The Commission correctly concluded that undergrounding requirements are subject to Section 253 and the Section 253 standards adopted in the *Section 253/332 Order*. Joint Petitioners' arguments do not warrant reconsideration of that decision.

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[52] *Petition* at 22.

[53] *Id.* ("Localities should have the ability to prescribe the location and aesthetics of these colocations.")